IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.B.KOSHY
&
THE HONOURABLE MRS. JUSTICE K.HEMA

THURSDAY, THE 13TH SEPTEMBER 2007 / 22ND BHADRA 1929

MFA.No. 1309 of 2002(B)

O.P(MV).NO.1274/1998 OF MOTOR ACCIDENT CLAIMS TRIBUNAL, KOLLAM
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APPELLANT/PETITIONER:

VISWANATHAN, SON OF KUMARAN,
ARUN NIVAS, EDAVATTOM, KARUVELIL, KOLLAM.

BY ADV. SRI.VELLAYANI SUNDARA RAJU,
ADV. SMT.P.MEENAKUMARI.

RESPONDENTS/RESPONDENTS IN THE O.P(MV):
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1. **N.SIVASANKARA PILLAI,**
   VAYOKALAZHIKATHU MELATHIL VEEDU, NJARACKAL,
   PERINADU, KOLLAM.

2. **SAHADEVAN, S/O. NARAYANAN,**
   EDAYANATTU PUTHEN VEEDU, CHEMMAKKODU.

3. **THE DIVISIONAL MANAGER,**
   NATIONAL INSURANCE COMPANY LTD., KOLLAM.

BY ADV. SRI.M.A.GEORGE
SRI.C.UNNIKRISHNAN (KOLLAM)

THIS MISC. FIRST APPEAL HAVING BEEN FINALLY HEARD ON 13/09/2007,THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.B. KOSHY & K.HEMA, JJ.

M.F.A.No. 1309 of 2002

Dated this the 13th day of September, 2007

Judgment

Koshy,J.

Appellant sustained serious personal injuries in an accident on 2.5.1998. While he was driving his Maruti car, it collided with a lorry driven by second respondent and insured by the third respondent insurance company. He claimed a compensation of Rs.2,00,000/-. The tribunal found that there is 40% contributory negligence on his part. Therefore, even though a compensation of Rs.1,10,000/- was calculated, what was awarded is only Rs.66,000/-. Quantum of compensation and finding of negligence are disputed in this appeal.

2. It is the case of the claimant that FIR registered on the complaint of the claimant was against the second respondent alone and only second respondent was charge-sheeted and the second respondent did not come and depose before the Tribunal refuting the negligence, but, tribunal relied on the scene mahazar and found that the accident occurred on the wrong side of the car and

place of occurrence as per the scene mahazar is only 1.25 metres from the southern road margin facing north. Even though claimant was examined, no independent witnesses were examined to fix the actual negligence on the parties. It is true that since there was valid insurance, second respondent did not adduce evidence before the tribunal refuting liability, but, that will not presume that he was only negligent. It can be seen from the scene mahazar that right front side of the lorry as well as the right front side of the Maruti car were damaged due to the accident. That shows that it was a head-on collision. If either of the vehicle was cautious, the accident could have been averted. The tribunal has also recorded that the place of occurrence mentioned in the scene mahazar is not seriously objected. In the above circumstances, we are of the view that finding of contributory negligence at 40% on the part of the claimant cannot be interfered with.

3. With regard to the quantum of compensation, there is evidence to show that doctor has certified 17% disability. Dr. N. Ahamed pillai, Associate Professor, Thiruvananthapuram Medical College issued disability

certificate assessing 17% disability. It reads as follows:

> "This is to certify that I have examined Mr.Viswanathan aged about 46 years, residing at Arun Nivas, Edavattam, Karuvelil, Ezhukone, Kollam district who was alleged to have been involved in a road traffic accident and treated at Medical College Hospital, Trivandrum vide IP No.921888 under S6 unit. Patient had multiple injuries and abrasions along with compound fracture patella right side with undisplaced fracturefemoral condyler. Patient underwent emergency Laparotomy andtotal patellectomy along with repair. He was treated by General Surgeon, Orthopaedic Surgeon, Neurosurgeon and Physiatrist. He was given a course of physiotherapy and symptomatic drugs. Following treatment he has recovered considerably and on review today the following permanent disabilities were noted.
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> 1. More frequent severe abdominal pain following direct trauma of abdomen and abdominal surgery, nausea, periodic bowel disorder requiring interruption of work.
>
> 2. Partial ankylosis on right knee joint following complete patellectomy in which motion limited to an arc from 160 degree to 90 degree flexion.
>
> 3. Post traumatic sequlae on right knee i which there is medio lateral instability due to undisplaced fracture of femoral condyler.
>
> 4. Gross wasting of quadriceps muscle on right knee.

> 5. Partial ankylosis on right ankle joint in which dorsiflexion and plantar flexion are grossly restricted.
>
> The permanent disability produced due to the above with reference to the specific partsas per McBride's scale has been estimated as 17%)(seventeen)."

However, the tribunal did not accept the same and reduced the disability to 15%. The appellant was employed in State Bank of India getting a salary of Rs.12,000/- at the time of accident. The entire medical expenses were reimbursed by the bank. Therefore, tribunal rightly did not grant any reimbursement of medical expenses. But, there is no reason why 17% disability was reduced to 15% by the tribunal. The tribunal also noticed that even though appellant continued on leave for four months, his salary was not reduced after the accident and he continued to get the same and, therefore, for the purpose of calculating compensation for disability and loss of earning power, only Rs.2,000/- was taken and 10 was taken as the multiplier. According to the claimant, as per the second schedule, 11 would have been taken as the multiplier. According to the counsel for the insurance company, since he continued his job at the age of 60, only 5 ought to have been taken as the multiplier. If

that be so, Rs.2,000/- is too meagre as the multiplicand to be fixed. He was a Bank Manager at the time of accident. It is true that the bank did not reduce the salary and in view of the patella fracture and other defects mentioned and his two operations etc. since he continued in treatment, he got salary, but, he has to continue the service with these difficulties which are permanent in nature. This will seriously affect his condition till his death. The chance of getting a job after retirement will become difficult. However, since his employment was not affected, we are of the opinion that it is not proper to have fixed the compensation for disability and loss of earning power on a multiplier method. Considering the medical certificate issued, percentage of disability certified, the amount of salary he was getting, his position in life and totality of circumstances, we are of the opinion that a total amount of Rs.60,000/- ought to have been granted for loss of earning power as well as after effects of the disability. The tribunal has granted Rs.36,000/- under this head. Therefore, an additional amount of Rs.24,000/- ought to have been granted. We have already found that assessment of contributory negligence at 40% is fully justified.

Therefore, 40% of the above should be deducted and balance additional amount payable will be Rs.14,400/-. The above amount of Rs.14,400/- should be deposited by the third respondent insurance company with 7.5% interest from the date of application till its deposit. On deposit of the amount, appellant is entitled to withdraw the same.

J.B.KOSHY
JUDGE

K. HEMA
JUDGE

vaa

J.B. KOSHY AND
K.HEMA,JJ.

M.F.A.NO. 1309 OF 2002

Judgment

Dated:13th September, 2007